

1 On September 16, 2015, Plaintiffs filed the present
2 Action, alleging that the Agreement is a disguised loan
3 transaction and asserting various California law claims
4 as well as violations of the Telephone Consumer
5 Protection Act ("TCPA"). Defendant now requests that
6 this Court dismiss, or in the alternative stay the
7 present action. For the reasons discussed below, this
8 Court **GRANTS** Defendant's Motion [18] and dismisses the
9 present matter.

10 I. BACKGROUND

11 A. Factual Background

12 Defendant is a Florida Limited Liability Company,
13 based in Miami, Florida, that is involved in "merchant
14 funding," that is, purchasing future receivables from
15 small to mid-size businesses. Plaintiff Ideal Co. is a
16 California corporation based in Los Angeles,
17 California. Pls.' Compl. ¶ 4, ECF No. 1. Plaintiff
18 Arnold Lara is president of Ideal Co. Id. Ideal Co.
19 entered into a Future Receipts Purchase and Sale
20 Agreement (the "Agreement") with IMF. See id. Ex. A.
21 Arnold Lara personally guaranteed that Ideal Co. would
22 not breach certain specified provisions of the
23 Agreement. Id. at Art VI., p. 1.

24 On May 12, 2015, the parties entered into the
25 Agreement together, wherein the Plaintiffs sold
26 \$76,680.00 of Ideal's receivables/revenue to Defendant.
27 Def.'s Compl. ¶ 11, ECF No. 11-3; see Pl.'s Compl. Ex.
28 A. The receivables/revenue were to be paid to

1 Defendant from a percentage of Ideal's daily
2 revenue/receivables, in exchange for an up-front sum of
3 \$54,000.00 from Defendant, less a filing fee of
4 \$295.00. Id. The receivables were to be paid to 1MF
5 in a fixed daily payment of \$290.45. See Pl.'s Compl.
6 Ex. A, p. 1, Art. III.

7 Between May 29, 2015 and July 23, 2015, 1MF
8 collected \$9,003.95 of the future receivables it had
9 purchased, leaving \$67,966.50 yet to be transferred.
10 See Reynolds Decl. ¶ 22, Ex. A. Defendant alleges that
11 "[o]n approximately July 24, 2015, Ideal Co. Breached
12 [] Section 4.1 of the Agreement and its representations
13 and warranties by converting the designated bank
14 account to a deposit-only account, thereby preventing
15 1MF from collecting the purchased receivables and
16 depriving 1MF of the benefit of the bargain." Mot. to
17 Compel Arbitration ("Mot.") 5:15-21.

18 Defendant alleges that after informal attempts to
19 resolve the issue failed, on September 9, 2015,
20 Defendant filed an action in Florida state court (the
21 "Florida action") seeking damages from Plaintiffs for
22 breach of the Agreement. Id. at 5:23-26. On September
23 16, 2015, Plaintiffs filed the present Action, alleging
24 that the Agreement actually represents a disguised loan
25 transaction and asserting claims under California law,
26 as well as violations of the Telephone Consumer
27 Protection Act. See generally Pls.' Compl., ECF No. 1.

28 On October 15, 2015, Defendant filed an arbitration

1 proceeding with the American Arbitration Association
2 ("AAA") in Miami, Florida, seeking to arbitrate its
3 claims for damages against Plaintiffs in the Florida
4 action, as well as a declaration that Plaintiffs'
5 claims asserted in this Action are without merit (the
6 "Arbitration Proceeding"). "After Plaintiffs would not
7 agree that these claims were arbitrable, the AAA and
8 the parties agreed to stay that proceeding pending this
9 [C]ourt's ruling on this Motion to Compel Arbitration.
10 On December 4, 2015, [Defendant] dismissed the Florida
11 Action without prejudice." Id. at 6:6-14. On March 1,
12 2016, this Court denied Defendant's Motion to Compel
13 Arbitration, finding that while the parties'
14 Arbitration Provision was valid and enforceable, and
15 while the parties' claims were all arbitrable, this
16 Court could not order the parties to arbitrate outside
17 of this Court's jurisdiction. See Order dated 3/1/16,
18 ECF No. 17 ("March 1 Order").

19 **B. Procedural Background**

20 On September 16, 2015, Plaintiffs brought the
21 present Action [1]. On December 8, 2015, Defendant
22 filed its Motion to Compel Arbitration [11]. On March
23 1, 2016, this Court denied Defendant's Motion to Compel
24 Arbitration [17]. On March 21, 2016, Defendant filed
25 the present Motion to Dismiss, or in the Alternative,
26 Stay [18]. The present motion was made following the
27 conference of counsel pursuant to Local Rule 7-3, which
28 took place during an exchange of emails between March

1 15, and March 21, 2016. Not. of Mot. 2:1-3, ECF No.
2 18. Plaintiffs have not opposed Defendant's present
3 Motion. The Motion was taken off-calendar and under
4 submission on April 14, 2016.

5 II. DISCUSSION

6 A. Legal Standards

7 1. Motion to Dismiss - Fed. R. Civ. P. 12(b)(1)

8 A motion to dismiss an action pursuant to Fed. R.
9 Civ. P. 12(b)(1) raises the question of the federal
10 court's subject matter jurisdiction over the action.
11 The burden of proof in a Rule 12(b)(1) motion is on the
12 party asserting jurisdiction. See Sopcak v. N.
13 Mountain Helicopter Serv., 52 F.3d 817, 818 (9th Cir.
14 1995); Ass'n of Am. Med. Coll. v. United States, 217
15 F.3d 770, 778-79 (9th Cir. 2000). If jurisdiction is
16 based on a federal question, the pleader must show that
17 he has alleged a claim under federal law and that the
18 claim is not frivolous. See 5B Charles A. Wright &
19 Arthur R. Miller, Federal Practice and Procedure, §
20 1350, pp. 211, 231 (3d ed. 2004). On the other hand, if
21 jurisdiction is based on diversity of citizenship, the
22 pleader must show real and complete diversity, and also
23 that his asserted claim exceeds the requisite
24 jurisdictional amount of \$75,000. See id.

25 2. Motion to Dismiss - Fed R. Civ. P. 12(b)(3)

26 Pursuant to Federal Rule of Civil Procedure
27 12(b)(3), a defendant may move to dismiss a complaint
28 for improper venue. Generally, courts look to the

venue provisions set forth in 28 U.S.C. § 1391 to determine whether venue is proper. When considering a motion to dismiss under Rule 12(b)(3), a court need not accept the pleadings as true and may consider facts outside of the pleadings. Argueta v. Banco Mexicano, S.A., 87 F.3d 320, 324 (9th Cir. 1996). Once the defendant has challenged a given court's jurisdiction for improper venue, the plaintiff bears the burden of showing that venue is proper. Piedmont Label Co. v. Sun Garden Packing Co., 598 F.2d 491, 496 (9th Cir. 1979). If the court determines that venue is improper, the court must dismiss the action or, if it is in the interests of justice, transfer the action to a district or division in which the action could have been brought. 28 U.S.C. § 1406(a). Whether to dismiss for improper venue or transfer venue to a proper court is within the sound discretion of the district court. See King v. Russell, 963 F.2d 1301, 1304 (9th Cir. 1992).

3. Motion to Dismiss - Fed. R. Civ. P. 12(b)(6)

Federal Rule of Civil Procedure 12(b)(6) allows a party to move for dismissal of one or more claims if the pleading fails to state a claim upon which relief can be granted. Fed. R. Civ. P. 12(b)(6). Dismissal can be based on "the absence of sufficient facts alleged under a cognizable legal theory." Balistreri v. Pacifica Police Dep't, 901 F.2d 696, 699 (9th Cir. 1990). A complaint "should not be dismissed under Rule

1 12(b)(6) 'unless it appears beyond doubt that the
2 plaintiff can prove no set of facts in support of his
3 claim which would entitle him to relief.'" Id. (citing
4 Conley v. Gibson, 355 U.S. 41, 45-46 (1957)). In a
5 Rule 12(b)(6) motion to dismiss, a court must presume
6 all factual allegations of the complaint to be true and
7 draw all reasonable inferences in favor of the non-
8 moving party. Klarfeld v. United States, 944 F.2d 583,
9 585 (9th Cir. 1991). A complaint must "contain
10 sufficient factual matter, accepted as true, to state a
11 claim to relief that is plausible on its face."
12 Ashcroft v. Iqbal, 556 U.S. 662, 678 (2009) (internal
13 quotation marks omitted).

14 **B. Analysis**

15 1. Defendant's Motion is Unopposed

16 Local Rule 7-12 provides that a party's failure to
17 file any memorandum or other document, such as an
18 opposition to a motion, within the proscribed deadline
19 "may be deemed consent to the granting or denial of the
20 motion." L.R. 7-12. Here, as Plaintiff has not
21 responded to Defendant's present Motion to Dismiss, or
22 in the Alternative, Stay [18-1], this Court may grant
23 Defendant's Motion pursuant to Rule 7-12. Nonetheless,
24 this Court will consider Defendant's Motion on the
25 merits.

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2. Dismissal is the Appropriate Remedy

In this Court's March 1 Order, addressing Defendant's Motion to Compel Arbitration [11], this Court found that (1) the parties' arbitration provision is within the scope of the FAA, (2) the arbitration provision is valid, and (3) all of the claims in this action are subject to the arbitration provision. Order dated 3/1/16, 7:1-12:9, ECF No. 17. In fact, as this Court noted in its March 1 Order, the parties do not dispute that the claims in the present matter are subject to their arbitration provision. Id.

In Defendant's Motion to Compel Arbitration, Defendant requested that this Court order the parties to arbitrate their claims in Miami, Florida. See generally Def.'s Mot. to Compel Arbitration, ECF No. 11. This Court held that it could not compel arbitration in Miami because this Court, pursuant to the Ninth Circuit's ruling in Continental Grain Co v. Dant & Russell, 118 F.2d 967, 969 (9th Cir. 1941), cannot compel arbitration outside of its jurisdiction. Accordingly, this Court denied Defendant's Motion. See Order dated 3/1/16, ECF No. 17.

The Federal Arbitration Act ("FAA") prescribes that when an issue referable to arbitration is brought before the court, the court "shall on application of one of the parties stay the trial of the action until such arbitration has been had in accordance with the

1 terms of the agreement, providing the applicant for the
2 stay is not in default in proceeding with such
3 arbitration." 9 U.S.C. § 3. This is so, even when the
4 court lacks the power to compel arbitration; it is the
5 existence of the agreement to arbitrate which requires
6 the court to stay proceedings until arbitration has
7 been completed.

8 However, circuit courts, including the Ninth
9 Circuit, have held that "§ 3 is not mandatory and,
10 alternatively, district courts may order dismissal
11 'when all claims are barred by an arbitration clause.'"
12 Randhawa v. Skylux, Inc., No. 09-cv-2304-WBS-KJN, 2010
13 WL 4069654, at *2 (E.D. Cal. 2010) (citing Sparling v.
14 Hoffman Const. Co., 864 F.2d 635, 638 (9th Cir. 1988));
15 see also Sparling v. Hoffman Construction Co., 864 F.2d
16 635, 638 (9th Cir. 1988); Choice Hotels Int'l, Inc. v.
17 BSR Tropicana Resort, Inc., 252 F.3d 707, 709-10 (4th
18 Cir. 2001) ("Notwithstanding the terms of § 3, however,
19 dismissal is a proper remedy when all of the issues
20 presented in a lawsuit are arbitrable."); Green v.
21 Ameritech Corp., 200 F.3d 967, 973 (6th Cir. 2000)
22 ("The weight of authority clearly supports dismissal of
23 the case when all of the issues raised in the district
24 court must be submitted to arbitration."); Alford v.
25 Dean Witter Reynolds, Inc., 975 F.2d 1161, 1164 (5th
26 Cir. 1992) (holding that § 3 "was not intended to limit
27 dismissal of a case in the proper circumstances.").

1 Further, "[s]ubstantial case law establishes that
2 [Rules 12(b)(1), (3) and (6) are the correct rules
3 under which to seek dismissal based on an arbitration
4 provision." Valley Power Sys., Inc. v. Gen. Elec. Co.,
5 No. 11-cv-10726-CAS-JCx, 2012 WL 665977, at *7 (C.D.
6 Cal. Feb. 27, 2012).

7 As dismissal is discretionary, and district courts
8 have frequently found dismissal to be the appropriate
9 remedy when all of the claims asserted are arbitrable,
10 this Court hereby **GRANTS** Defendant's Motion [18], and
11 dismisses this action without prejudice.

12 **III. CONCLUSION**

13 Based on the foregoing reasons, this Court **GRANTS**
14 Defendant's Motion [18].

15 **IT IS SO ORDERED.**

16 DATED: May 18, 2016 s/ RONALD S.W. LEW
17 HONORABLE RONALD S.W. LEW
18 Senior U.S. District Judge
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